

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MICHAEL J. MALPERE COMPANY, INC.

and

CASE 22-CA-30045

BRICKLAYERS & ALLIED CRAFTWORKERS
ADMINISTRATIVE DISTRICT COUNCIL
of NEW JERSEY and its LOCAL UNION 4

Joshua Mendelson, Esq. and Julie Kaufman, Esq.,
for the Acting General Counsel¹
Robert F. O'Brien, Esq.,
for the Charging Party²
Ebonee' Hamilton Lewis, Esq. and David K. Broderick, Esq.,
for the Respondent³

DECISION

Statement of the Case

WILLIAM NELSON CATES, Administrative Law Judge. This is a wrongful discharge case I heard in Newark, New Jersey, on April 17 and 18, 2012. The case originates from a charge, with multiple amendments, filed by the Union against the Company.⁴ The prosecution of this case followed the issuance of a first amended complaint and notice of hearing (complaint) issued by the Regional Director for Region 22 of the Board, acting in the name of the Board's Acting General Counsel, on April 9, 2012.⁵

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the National Labor Relations Board (Board) as the Government.

² I shall refer to counsel for the Charging Party as counsel for the Union and I shall refer to the Charging Party as the Union.

³ I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

⁴ The original charge was filed on June 28, 2011 and thereafter amended on September 23 and 28, 2011 and on January 26 and February 29, 2012.

⁵ All dates hereinafter are 2011 unless otherwise indicated.

The complaint alleges the Company on or about June 8 terminated its employee Adelso Carrillos and on an unknown date in June terminated its employees Antolin Carrillos and Marvin Munoz, for concerted complaining to the Company by demanding a wage increase, higher transportation allowances and/or a different method (check instead of cash) of payment of wages.

5 It is also alleged the Company discharged the three employees because they assisted the Union and to discourage employees from doing so. It is alleged the Company's actions violate Section 8(a)(1) and (3) of the National Labor Relations Act. (the Act).

10 The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

15 The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely, in part, on those observations in making credibility determinations herein. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

Findings of Fact

I. Jurisdiction, Supervisory/Agency and Labor Organization Status

20 The Company is a corporation with an office and place of business in Cranford, New Jersey, where it is engaged as a masonry contractor in the construction industry doing residential, commercial, and office construction and repair. During the 12-month period ending June 30, a representative period, the Company in conducting its business operations, provided services valued in excess of \$50,000 for various enterprises, including Holiday Inn, Bergen Regional Medical Center, and the University of Medicine and Dentistry of New Jersey, within the State of New Jersey, all which enterprises are directly engaged in interstate commerce. The parties at trial stipulated, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

35 It is admitted Company owner Michael J. Malpere (President Malpere) is a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act.

At trial the parties stipulated, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

40 President Malpere founded the Company in 2003 and is its sole owner. The Company performs repointing, caulking, waterproofing, brick/stone mortar replacement, and power washing services. Malpere, testifying as an adverse witness for the Government, described himself as the Company's "head chief and bottle washer." Malpere testified he performs all

estimating for job bids, oversees and manages all jobs once awarded, does all budgeting, purchases all materials and supplies, establishes company policies, sets wage rates and supervises the day-to-day operations of the Company. Malpere explained he has no vice presidents or human resources department employees to assist him. Malpere signs all documents for the Company including documents filed with the State of New Jersey and the Federal Government. Malpere testified he personally interviews and hires all employees and no one works for the Company without his having met them. Malpere testified most of his hires have been referred to him by those he knew in the industry and by applications from relatives of those already working for the Company.

Malpere testified the Company never, at any time, employed or, in any manner, paid Adolfo Carrillos, Antolin Carrillos, Marvin Munoz, or labor broker Bernardo Fernandez. Malpere testified specifically he never paid Fernandez for services of any kind for the Company, nor did he pay Fernandez for referring workers to the Company. Malpere testified he never worked a job with the Carrillos brothers, Munoz, or Fernandez. Malpere added he did not know nor had he ever met the Carrillos brothers, Munoz, or Fernandez. Malpere denied ever, at any time, placing telephone calls to Fernandez.

The worksite most at issue, herein, was the County College of Morris in Randolph, New Jersey. The work at the College was performed on Sheffield Hall, repointing, caulking, water proofing and power washing the exterior of the building. Company President Malpere testified the job lasted from June until August and he utilized five to seven employees doing, among other assignments, grinding work performed from scaffolds on the sides of the building removing old joint concrete and replacing it with new. Malpere testified his Company was the only company performing outside masonry work at the site even though other contractors were on site.

Company President Malpere testified and provided details about employees whom he said did work for the Company including Tyrone Bozerman, a longtime African-American employee from Brooklyn, New York, who worked at the College site. Malpere said Edward Hargin, an employee he described as having long hair, along with Philip Costaldo [or Castaldo] also worked the College site. Malpere testified that at least two of his employees spoke both English and Spanish. The two, Segundo Oralano an Ecuadorian, also known as David, has worked for the Company for 9 years and the other longterm bilingual employee was Freddie Martinez.

I am setting forth, in some extended detail, testimony regarding the work history and related matters involving Antolin Carrillos, Adolfo Carrillos, and Munoz. I also set forth detailed descriptions by them of some of their fellow workers. I do so because Company President Malpere testified they never worked for the Company.

Marvin Munoz described some of the Company's regular employees he worked along side at the Company. Munoz described an employee with long hair, as well as, an African-American employee from Brooklyn, New York. Munoz testified he also worked along side Freddie Martinez whom he said was from Guatemala.

Adelso Carrillos testified he began working for the Company in 2009 performing construction work including building bridges, masonry, and caulking work. Carrillos worked at approximately 15 different job locations for the Company and always found out about the work from labor broker Fernandez. Marvin Munoz testified he worked on approximately five jobsites for the Company and he also learned of the work from Fernandez. Adelso Carrillos testified he has known Fernandez ever since he came to the United States in 1997. Carrillos testified, typically labor broker Fernandez would telephone him at home about work, they would meet the next morning at a local café and Fernandez would transport he and the others to the worksite, or, drop them off at Malpere's home and they would then be transported to work in a company vehicle. Munoz also testified about Fernandez driving them to Company President Malpere's home and they would then be taken to the jobsites in a company vehicle. Munoz described Malpere's home as having a white fence around it. Munoz testified it was at Malpere's home that Malpere first introduced himself to Munoz.

Adelso Carrillos testified his first job at the Company was at the Long Branch, New Jersey site doing caulking, washing, and painting. Carrillos said he, along with his brother Antolin, and an individual, El Chopito, worked the Long Branch job for about 3 months. Two other company employees, a foreman named George, and a "short" employee, whose name he did not know, worked at the Long Branch site. Around the second day on the Long Branch job, Malpere came to the worksite and introduced himself, speaking in Spanish, to Carrillos. Antolin Carrillos and Ed Chopito were present at the time. Adelso Carrillos testified Malpere asked if he could do the job, and said if he could not, he would telephone labor broker Fernandez to take Carrillos home. Carrillos assured Malpere he could do the job because he had been working in construction for a long time. Carrillos testified that on some occasions Malpere would tell him "he didn't do enough that day." However, on other occasions, Malpere would tell Carrillos he was doing a good job. Carrillos testified Malpere visited this worksite two or three times per week. Carrillos said he was paid \$12.50 per hour in cash for this job and the money was given to him by Fernandez on Wednesdays or Thursdays.

Adelso Carrillos worked for the Company on a 3 story brick building on Williams Street in Newark, New Jersey. Carrillos testified Antolin Carrillos worked this job, as well as, employees named Marvin, David from Ecuador, George and an African-American employee from Brooklyn. Carrillos testified Company President Malpere visited this jobsite once or twice per week. Carrillos said he was paid \$12.50 per hour by Fernandez in cash every Wednesday or Thursday on this job.

Adelso Carrillos testified labor broker Fernandez transported he, his brother Antolin, his nephew Edwin, and Marvin Munoz to their next job with the Company at the Union Town New Jersey Police Department where they performed silicone, brick, and cement work for 2 months. Carrillos testified there were other employees whom he only knew by their first name. George, who was their foreman and David an African-American employee from Brooklyn. Carrillos testified Malpere visited this jobsite three times per week. Carrillos was paid on this job \$12.50 per hour in cash on Wednesdays or Thursdays by labor broker Fernandez.

Adelso Carrillos testified that after completion of the Union Town Police Department job, Fernandez told them about their next job which started in June at the County College of

Morris. Carrillos testified they were told to grind old cement from the joints around the stone on the outside of one of the buildings on the college campus and replace it with new concrete. Carrillos said they worked on swing scaffolds and he worked along side his nephew Edwin Carrillos. Antolin Carrillos and Marvin Munoz also worked on other scaffolds at the site.

5 Carrillos testified others working at the college site were foreman George, another older "white" employee named George, as well as, David and Kevin.

Adelso Carrillos testified labor broker Fernandez transported he, his brother Antolin Carrillos, nephew Edwin Carrillos and Munoz to the college worksite the first week. Fernandez then telephoned Adelso Carrillos at home informing him he could no longer transport them to the jobsite, they would have to provide their own transportation. Fernandez told Carrillos he would pay \$30 toward their gasoline expenses. Adelso Carrillos testified that on about the second day of his driving the others to work he told Fernandez at work that the \$30 per week was not enough to cover their gasoline expenses. Fernandez said he could not give any additional money that

10 Carrillos would have to talk with Company President Malpere. Two days later, Carrillos spoke with Malpere at the college worksite along with his brother Antolin, his nephew Edwin, and Marvin Munoz. Carrillos told Malpere he was not paying them enough money and was giving them too little for gasoline money.

Adelso Carrillos specifically testified, "I told him that it was very little that he was paying us because I knew that the state jobs are a lot of money, and what they were paying us it was a little money, \$12.50." Adelso Carrillos testified he told Malpere he wanted to be paid by check instead of cash, because he wanted to pay State taxes because he only had a temporary permit which could be suspended if he failed to pay taxes. Carrillos told Company President Malpere

20 he also wanted to pay taxes so he could receive unemployment benefits during the "cold months" when there was no work in New Jersey. Malpere told Carrillos there was nothing he could do for them to talk with labor broker Fernandez. Carrillos testified Malpere said he did not want to pay by check, "because he didn't want to pay the state taxes," and he did not care about Carrillos getting unemployment. Adelso Carrillos testified the others with him told Malpere they

25 wanted more money that they were working for too little. Antolin Carrillos told Malpere he also wanted to be paid by check instead of cash.

Company President Malpere testified he did not pay his employees any transportation allowance nor did he pay for gasoline, toll road fees, or mileage and added no employee ever brought such concerns to his attention.

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Munoz testified he was paid in cash at the college site work. Munoz said Fernandez gave them cash in envelopes with their names on the envelopes. Munoz testified he asked Fernandez where the cash came from. Fernandez told him Company President Malpere had given him the envelopes with the cash. Munoz testified he also complained to Fernandez about his \$12.50-per-hour pay rate. Munoz testified Malpere's regular employees did the same work as he, Antolin Carrillos and Adelso Carrillos did at the college worksite and they wanted to be paid the same, which was approximately \$60 per hour, rather than the \$12.50 they were being paid. Munoz testified Antolin Carrillos and Adelso Carrillos "always told Bernardo [Fernandez] to tell Mike

40 [Malpere] that for us to get paid the same as George but Bernardo said that Mike had said No!" Company President Malpere also told them he could not do anything for them.

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Adelso Carrillos testified that thereafter, while he was cutting concrete out of joints around stones, at Sheffield Hall at the college site, two representatives from the Union, whom he had never seen before, came to the site. Carrillos testified the two told him to stop working, which he did, leaving his scaffold to meet them at ground level along with Antolin Carrillos and later Munoz and Edwin Carrillos joined them. Carrillos testified he learned the two were Union president/field agent, Ken Simone, and union vice president/field agent, Carlos Crespo. Carrillos testified Crespo, speaking in Spanish, told them they were from the Union and advised them they could not continue to work because they did not have the correct safety goggles or breathing masks. Crespo explained the masks they were wearing still permitted dust to be breathed and the dust would also impact their eyes. Crespo asked how much they were earning. Adelso Carrillos told Crespo \$12.50 per hour. Carrillos testified Union President Simone went around Sheffield Hall taking pictures of the building and those working thereon. Vice President Crespo and President Simone asked Adelso Carrillo, and the others, if they wanted the Union to help them.

Company President Malpere testified he provided respirators, approved by the Federal Government, for his employees to wear, as well as shields, goggles, and safety harnesses.

Adelso Carrillos testified they did not get to talk very much with Crespo and Simone that day because after Crespo and Simone told Company Foreman George they were from the Union, George contacted Malpere by radio and Malpere directed George to have the employees leave the job immediately. Company President Malpere testified he told the employees to stop working the day the Union visited the college jobsite because the cutting and grinding was making too much dust. Malpere said he had vacuums placed on the grinders the next day to eliminate the dust. Adelso Carrillos, Antolin Carrillos, Edwin Carrillos, and Marvin Munoz gathered their belongings after being told to stop working for the day and walked toward the parking lot with Crespo and Simone. There were five other company employees working the college site that day; namely the two employees named George, Kevin; David and "another guy" Carrillos didn't know. Those five were not, however, with Adelso Carrillos and the others walking to the parking lot. As they walked to the parking lot Adelso Carrillos told Crespo and Simone they wanted the Union's help, "because what we were getting paid was not fair."

Adelso Carrillos testified that as they walked to the parking lot, Company President Malpere arrived and Union Vice President Crespo and Union President Simone left them to speak with Malpere who, Carrillos said, was about 20 feet away. Munoz testified that as Malpere came by where foreman George was, "he turned around and he saw where we were, he saw us; we were talking with the union people. Then he ran to where the union people were, and then people from the union went to talk to him; then we saw he was getting mad, we left in the car." Adelso Carrillos testified he heard Crespo and Simone introduce themselves to Malpere and that Malpere responded he knew who they were. Carrillos was unable to hear anything further in the conversation. Crespo and Simone returned to where Carrillos and the others were and Adelso Carrillos and Crespo exchanged telephone numbers. Carrillos and the others then left the parking lot for home.

Company President Malpere testified that Adelso Carrillos, Antolin Carrillos, and Marvin Munoz did not work for the Company at the time the two union representatives visited the

college worksite and he did not see them at the site that day nor did he see them speaking with Crespo or Simone.

Adelso Carrillos testified that as he, Antolin Carrillos, Edwin Carrillos, and Marvin Munoz were driving away he received a telephone call from labor broker Fernandez asking why they had talked with the people from the Union. Carrillos testified Fernandez told him the union people could not touch him because, “for the people from the Union to let the job continue they might have to give them a check for \$30,000 for them to finish the job and at the end of the job give them another \$30,000.” Fernandez told Adelso Carrillos that Malpere said they were not to return to work the next day.

Adelso Carrillos testified that a couple of days later he met with Fernandez at a local coffee shop. Fernandez told Carrillos Company President Malpere did not want Carrillos back at work anymore because Carrillos complained a lot, and, spoke too much with the union people. Carrillos told Fernandez he had not done anything wrong and asked for Malpere’s telephone number. Fernandez told Carrillos Malpere had instructed him not to give Malpere’s telephone number to Carrillos. Adelso Carrillos told Fernandez he knew where Malpere lived, as he had previously been to Malpere’s home, and would go to his home to talk with him. Fernandez told Carrillos; “Don’t even get close to his house because he will shoot you.” Adelso Carrillos was never thereafter returned to work at the Company.

Adelso Carrillos identified Marvin Munoz, Edwin Carrillos, Antolin Carrillos, and himself in pictures of them performing work at the Company’s County College of Morris worksite. The pictures were taken by Union President Simone at the time he and Union Vice President Crespo visited the college worksite. Munoz also identified himself, Adelso Carrillos, Antolin Carrillos, Edwin Carrillos and other employees of the Company in the pictures taken by Simone.

Munoz testified that after work was stopped at the college jobsite on Wednesday, he, Adelso Carrillos, Antolin Carrillos, and Edwin Carrillos did not work for the Company the remainder of that week. Munoz said he, Edwin Carrillos, and Antolin Carrillos, thereafter, returned to work for a week or so for the Company but at a different worksite. Munoz testified Company President Malpere, “was not the same” “he was very serious” at the new jobsite. Munoz testified “Adelso [Carrillos] was not working” at this new jobsite because “Adelso was the first one that he [Malpere] fire[d].” Munoz testified he heard from some of the regular workers that Malpere was angry with them so he telephoned labor broker Fernandez to ask about their future with the Company. Munoz specifically asked Fernandez if Malpere was going to give them anymore work. Munoz testified Fernandez said Company President Malpere was not, “he’s mad at you because you spoke with people from the union.” Munoz said that after that phone call he, Antolin Carrillos, and Edwin Carrillos never again worked for the Company.

Union Vice President Crespo testified about his and Union President Simone’s visit to the Company’s worksite at the County College of Morris in June. Crespo testified they continually visit jobsites in New Jersey in connection with supplying manpower to unionized projects and to try and organize unorganized workers. Crespo testified that if a specific job is a “public job” the Union checks to see if proper wages are being paid. Crespo explained proper pay for public jobs

in New Jersey is \$63.07 per hour, which includes an hourly rate as well as benefits, set by the State of New Jersey and called the “prevailing wage.” Crespo testified that when they visited the college jobsite they observed employees dry cutting cement with grinders that “sends a tone of dust into the air.” He said the dry dust from such grinding, if breathed in quantity, causes silicosis. Crespo explained dry cutting is also unlawful in the State of New Jersey. Crespo testified he observed four different workstations at the college jobsite where dry cutting was taking place. He said the workers were upon scaffolds or scissor lifts dry cutting which caused dust to go everywhere. Crespo and Simone took pictures of the dry cutting (grinding).

Crespo identified Edwin Carrillos, Antolin Carrillos, and Adeldo Carrillos as employees dry cutting at the time they visited the college worksite. Crespo testified he signaled the workers asking them to stop working and speak with him. Crespo spoke Spanish with the employees. Crespo testified he told the employees, first Adeldo Carrillos and Edwin Carrillos before others joined them, that they had inadequate protection from the dust. Crespo then asked who they worked for and was told Michael Malpere. Crespo asked how much they were being paid and was told \$12 per hour except \$10 per hour for Edwin Carrillos. Crespo told them they should be paid much more because it was a “public job.” Crespo testified that shortly thereafter, a foreman for the Company shut the job down. Crespo said he and Simone walked with the four Spanish employees, Antolin Carrillos, Adeldo Carrillos, Edwin Carrillos, and Marvin Munoz to their car where he and Adeldo Carrillos exchanged telephone numbers. Crespo testified Company President Malpere arrived at the jobsite and came toward where they were with the Spanish workers. Crespo testified Union President Simone greeted Company President Malpere who was “visible upset.” Simone testified he introduced himself to Malpere offering him one of his business cards. Simone testified Malpere said he knew who Simone was because he used to deal with the Union. Simone told Malpere he did not realize Malpere used to deal with the Union and asked “how’s about a chance of . . . working something out on this job . . . it’s a prevailing wage job.” Simone also told Malpere, “we have a trained, certified workforce . . . [m]aybe we can work something out.” Simone testified Company President Malpere laughed and said, “No fucking way. When I was Union, I couldn’t get a job. Now I’m open shop and I get all the fucking work I want. I’ve had it with you guys.” Malpere denied using any profanity in his conversation with the union representatives. Malpere wanted to know exactly what Crespo and Simone were doing at the worksite. Crespo told Malpere they were there to check out the site and visit with the workers. Simone told Malpere he was not paying the prevailing wage. Malpere said he was “paying everybody here prevailing wage.” Crespo testified Simone responded that remained to be proven and added the workers were claiming he was paying them \$12 or \$10 per hour in cash. Crespo testified Malpere became “loud” and “upset” asking what they intended to do. Simone told Malpere they were going to report the matter to the State of New Jersey because Malpere had “bid the job to pay prevailing wage.” Crespo and Simone testified that ended their meeting with Malpere and they left the job site.

Adeldo Carrillos testified he saw Company President Malpere some 3 months after his termination at a material store in Newark, New Jersey. Carrillos testified Malpere asked him, “why did you shake my company?” Carrillos responded that he “didn’t do anything.” Carrillos testified Malpere wanted to know where he was working. Carrillos testified he told him New York, and nothing else, because he was afraid Malpere might telephone his new employer and “talk bad about” him. Carrillos testified he saw that Malpere was angry and so he left the store.

Carrillos testified labor broker Fernandez then telephoned and told him Company President Malpere was “upset” with him and that Malpere had said that “just because there were people there [in the store] that’s the only reason why he didn’t crack my head open with a crutch.”

The Government presented telephone records establishing that Company President Malpere and Fernandez exchanged approximately 178 telephone calls between May 16, 2011 and January 2, 2012. The Government also provided telephone records establishing numerous telephone exchanges between Fernandez and Malpere, Antolin Carrillos, Adelso Carrillos, and Marvin Munoz between June 29 and August 9.

B. Credibility Resolutions

In deciding whether the alleged discriminates were employees of the Company and, if so, did they engage in protected concerted and/or union activities and were they wrongfully terminated, it is necessary to first make a critical credibility resolution. That resolution pertains to whether Company President Malpere knew any of the alleged discriminates or the alleged labor broker herein. Malpere testified the Company did not, at any time, employ or in any manner pay Adelso Carrillos, Edwin Carrillos, Marvin Munoz, or labor broker Bernardo Fernandez for any work or services. Malpere testified he did not know nor ever met Adelso Carrillos, Antolin Carrillos, Edwin Carrillos, Munoz or Fernandez. Malpere testified he never at any time worked a job with Adelso, Antolin and/or Edwin Carrillos, Munoz or Fernandez. Malpere also testified he never placed telephone calls to labor broker Fernandez nor had he ever paid Fernandez for referring workers to the Company. If Company President Malpere’s testimony, as described above, is credited the alleged discriminates herein would not have been employees of the Company and that would end the case.

In making my credibility resolutions, I was impacted by impressions I formed while observing the six witnesses herein as they testified. The impressions I gathered were based on a combination of the witnesses’ mannerisms, how they spoke and their overall bearing on the witnesses stand. I applied my observations as one, among other factors, in deciding whether witnesses’ testimony impressed me as candid, fair, and believable. That said, I am unwilling to credit any contradicted testimony of Company President Malpere. His witnesses stand demeanor fully persuaded me his testimony is unworthy of belief. There are numerous additional considerations, and I shall set forth a couple, that also convinced me of the unreliability of Malpere’s testimony. For example, Malpere testified he never made any telephone calls to labor broker Fernandez whereas telephone records reflect numerous calls between Malpere and Fernandez. Another example relates to Malpere’s claim Adelso Carrillos, Antolin Carrillos, Edwin Carrillos, and Marvin Munoz never worked for the Company. That claim is refuted by photographs of the four working along side other employees of the Company at the Company’s County College of Morris, Randolph, New Jersey work site. Additionally, there is the testimony which I specifically credit, of Adelso Carrillos, Marvin Munoz, Union President Simone, and Union Vice President Crespo that the alleged discriminatees worked for the Company and particularly at the Company’s college worksite.

C. Analysis and Conclusions

1. Employee status

5 In light of the above, and as explained more fully below, I find Adelso Carrillos, Antolin ,
and Munoz were, at all times material herein, employees of the Company within the meaning of
Section 2(3) of the Act. Adelso Carrillos testified, at length, about his work history, including
different job sites he worked, for the Company. Carrillos described in detail certain of the
10 regular employees of the Company he worked along side at these different jobsites. Adelso
Carrillos also described the grinding work he and the others performed at the college work site
and photographs made at worksite confirm not only his description of the work, but that he,
Antolin Carrillos and Munoz performed work at that jobsite. Munoz credibly testified he worked
at the college site among other jobsites. The evidence not only establishes Adelso Carrillos,
Antolin Carrillos, and Munoz worked for the Company; it also establishes Company President
15 Malpere knew they worked for his Company. Munoz credibly testified he first met Malpere at
Malgere's home when Malpere came up to him and introduced himself. Adelso Carrillos
credibly testified Malpere introduced himself to him at the Long Branch jobsite and asked, in the
presence of Antolin Carrillos and Ed Chopito, if Adelso Carrillos could do his job and if he could
not he would telephone labor broker Fernandez to take him home. Adelso Carrillos testified
20 Malpere visited that jobsite two or three times per week and would sometimes tell Carrillos he
didn't do enough work that day while on other days he would tell him he was doing a good job.
It is clear Malpere knew who the four employees in question were and that they worked for the
Company. Malpere also visited the Newark, New Jersey Williams Street job site once or twice
per week and the Union Town New Jersey Police Department its three times per week while the
25 four workers were there. As will be discussed more fully hereafter, Malpere knew the four
workers were on the college jobsite.

2. Agent status of Fernandez

30 The evidence establishes, and I find, labor broker Fernandez acted as an agent of the
Company within the meaning of Section 2(13) of the Act and his actions and conduct are
imputable to the Company. In deciding whether an individual is an "agent" "It is the long-
established policy and practice of the Board to apply the common-law principles of the Agency."
SAIA Motor Freight, Inc. 334 NLRB 979 (2001). An employer, under the doctrine of apparent
35 authority, may be held liable for the actions of an alleged agent. Under the doctrine of apparent
authority, an agency relationship is established where a principal's manifestations to a third
party supply a reasonable basis for the third party to believe that the principal has authorized the
alleged agent to perform the acts in questions. *SAIA Motor Freight, Inc.* supra citing *Den-Tech*
Corp., 294 NLRB 924, 925 (1989). Where there is no actual authority of agency status, the test
40 in determining whether the actions by an individual toward employees is attributable to the
employer is whether under all the circumstances the employees would reasonably believe that
the individual in question was reflecting company policy and speaking and acting for
management. *SAIA Motor Freight, Inc.* supra citing, *Waterbed World*, 286 NLRB 425, 426-427
(1987), supplemented by 301 NLRB 589 (1991), enfd. 974 F.2d 1329 91st Cir. 1992) quoting
45 *Einhorn Enterprises*, 279 NLRB 576 (1986), enfd. 84 3 F.2d 1507 (2d Cir. 1988), cert denied
sub nom. *Star Color Plate Service* 488 U.S. 828 (1988)). Stated somewhat differently, the

principal must either intend to cause a third party to believe the alleged agent is authorized to act for the principal, or, the principal should realize the conduct or action of the alleged agent is likely to create such a belief.

5 The credited testimony shows Company President Malpere intended for Adelso Carrillos, Antolin Carrillos, Munoz and Edwin Carrillos to believe labor broker Fernandez was authorized to speak and act for him. First, it was Fernandez who contacted Adelso Carrillos and the others by telephone to see if they wanted to work at the various work sites of the Company. The Carrillos brothers and Munoz would meet Fernandez at a local café each morning and
10 Fernandez would then transport them to the job site himself or to Company President Malpere's home and they would then be taken to the jobsite in Company vehicles. Second, Fernandez was the one who told Adelso Carrillos and the others how much they would be paid. Third, Fernandez told the workers at issue herein their job duties. Fourth, Fernandez paid the workers their wages in cash in envelopes with their names on them each Wednesday or Thursday. Fifth,
15 Malpere, in asking Adelso Carrillos if he could do a job assigned to him, told Carrillos if he could not he would telephone Fernandez to come and take him home. Sixth, Fernandez told Adelso and the others he would not transport them to the job sites any longer but would provide some compensation toward their travel expenses. Seventh, the workers complained to labor broker Fernandez that the money for transportation expenses was inadequate. When the workers
20 spoke with Company President Malpere about not being paid fairly or given enough transportation expenses Malpere told them there was nothing he could do for them to talk to Fernandez. Malpere and Fernandez stayed in close contact with each other. They placed in excess of 100 telephone calls between May 2011 and January 2012. Finally, it was Fernandez who told Adelso Carrillos and later Antolin Carrillos and Munoz their employment with the
25 Company was terminated.

 Under these Circumstances, I find the Company placed Fernandez in a position where employees Adelso Carrillos, Antolin Carrillos, Munoz and others would reasonably believe he was speaking and acting on the Company's and/or Malpere's behalf. As stated earlier I find
30 Fernandez is an agent of the Company within the meaning of Section 2(13) of the Act and his conduct is imputable to the Company.

3. Concerted Protected Activity

35 The credited testimony establishes Adelso Carrillos, Antolin Carrillos and Munoz engaged in concerted activity protected by the Act. However, before addressing that testimony it is helpful to review certain guidance of the Board and courts regarding concerted activity. Section 7 of the Act guarantees employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act
40 makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The statute requires the
45 activities under consideration be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). As the Board observed in *Meyers I* "Indeed, Section 7

does not use the term ‘protected concerted activities’ but only concerted activity.” In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstance a single employee could engage in concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir.1988). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). It is clear the Act protects discussions between two or more employees concerning terms and conditions of employment. Stated differently, it is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Nothing is more basic “terms and conditions” of employment than wages. *Parexel International, LLC.*, 356 NLRB No. 82, slip op. at 3 (2011). Once the activity is found to be protected concerted activity an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee’s activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., termination) was motivated by the employee’s protected concerted activity.

Here the three (actually four including Edwin Carrillos) employees engaged in protected concerted activity, which had its origin when labor broker and company agent Fernandez informed them, contrary to past practice, he would no longer provide them transportation to and from the work sites. Instead, Fernandez said he would provide \$30 per week for gasoline expenses. Adelso Carrillos immediately told Fernandez that was insufficient to cover their travel expenses. Two days later, while at work with the others, Carrillos again told Fernandez the \$30 gasoline money was not enough to cover their transportation expenses. Fernandez told them he could not give them anymore that they needed to talk with Company President Malpere. A couple of days thereafter Adelso Carrillos, along with Antolin and Edwin Carrillos and Munoz, spoke with Malpere about the matter at the college work site. Adelso Carrillos told Malpere he was not paying them enough that it was a state job that paid a lot of money and they wanted more money. Carrillos also told Malpere that what he was giving them for gasoline money was too little. The others also told Malpere they wanted more money and were being paid too little. Both Adelso Carrillos and Antolin Carrillos told Malpere they wanted to be paid by check instead of cash. Adelso Carrillos even explained to Malpere that one of the reasons he wanted to be paid by check was so he could pay taxes and protect his work status. Company President Malpere told them he could not do anything for them that they should speak with labor broker Fernandez. The above clearly establishes Adelso Carrillos, Antolin Carrillos and Munoz engaged in concerted activity protected by the Act when they spoke with Fernandez and Malpere about their wages and benefits, and I so find.

4. Union activity

It is undisputed that Union President Simone and Union Vice President Crespo visited the Company’s County College of Morris jobsite in June 2011 and spoke with Company President Malpere. Their visit came a few days after Malpere and labor broker Fernandez had told Adelso Carrillos, Antolin Carrillos, Edwin Carrillos, and Munoz there was nothing they could do for them about an increase in gasoline expenses or an increase in wages. The credited testimony establishes Simone and Crespo met with the four employees and discussed, among other things,

the dangerous working conditions at the site. The two union representatives, after learning from the employees they were being paid below the prevailing wage rate, offered to assist them in that respect. The employees accepted Simone and Crespo's help "because what [they] were getting paid was not fair." It is undisputed Company President Malpere was not at the job site when the two union representatives first arrived but was immediately summoned by a foreman to come to the site and meet with the two representatives from the Union. The credited testimony further shows that as the four workers were walking with the two union representatives toward to their car to leave the worksite Malpere arrived. Simone and Crespo approached Malpere, who was running toward them. Simone, Crespo, and Malpere were close enough to the four workers for Adelso Carrillos, who was 20 feet away, to hear Simone and Crespo introduce themselves and hear Malpere say he already knew who they were. Malpere was close enough to the four workers for Munoz to observe Malpere turn around and look directly at them and for Munoz to observe that Malpere "was getting mad."

The credited testimony establishes Malpere was "upset" when Simone told him he was not paying the prevailing wage to the four workers but rather was paying them \$10 or \$12 per hour. Malpere then became more "loud" and "upset" and asked what the Union was going to do about it. Simone and Crespo asked Malpere about doing the job union but Malpere rejected that suggestion explaining he had been union in the past and could not get work but when he became an open shop without a union he could get "all the fucking work" he wanted and there was "no fucking way" he was going back to being union.

The credited testimony establishes that as Adelso Carrillos, Antolin Carrillos, Edwin Carrillos and Munoz were driving together away from the jobsite labor broker Fernandez telephoned Adelso Carrillos. Fernandez wanted to know why they had talked with the people from the Union and told them Company President Malpere said they were not to return to work the next day. The credited testimony further shows that 2 days later Fernandez met with Adelso Carrillos at a local coffee shop and told him Malpere did not want him back at work anymore because Carrillos complained a lot and spoke too much with the union representatives. It is established, Adelso Carrillos never thereafter returned to work for the Company.

The credited testimony shows Munoz, Antolin and Edwin Carrillos returned to work for the Company after the union visit for a week or so but at a different work site. Company President Malpere's attitude toward the workers changed he "was not the same" at the new site. After Munoz heard from the regular workers Malpere was unhappy with them he telephoned labor broker Fernandez to ask about their future with the Company. Fernandez told Munoz that Malpere was not going to give them anymore work and stated, "he is mad at you because you spoke with people from the union." Munoz and Antolin (as well as Edward Carrillos) never thereafter returned to work for the Company.

5. The three discharges

It is clear, as more fully explained below, the Company violated the Act when it terminated the employment of Adelso Carrillos, Antolin Carrillos, and Munoz. In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced its causation test in cases, such as herein, that allege violations of Section

8(a)(3) of the Act or violations of Section 8(a)(1) that turns on employer motivation. To establish such a violation, the government must prove, by a preponderance of the evidence, that an individual's protected activity was a motivating factor in the employer's action. Once the government makes this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden, the government must show the employee was engaged in protected activity, that the employer was aware of that activity and the activity was a substantial or motivating reason for the employer's action. Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. See *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). To support an inference of unlawful motivation, the Board may look to, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); *Mesker Door, Inc* 357 NLRB No. 59, slip op. at 2 (2011). If the proffered reason for a termination or discharge is pretextual the employer necessarily fails to establish a *Wright Line* defense. Stated differently if an employer's asserted justifications is pretextual such supports a finding of unlawful motivation and precludes a *Wright Line* defense. *Relco Locomotives, Inc.* 358 NLRB No. 32 (2012), citing *Approved Electric*, 356 NLRB No. 45 slip op. at 3(2010), and *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2(2010).

It is clear Adelso Carrillos, Antolin Carrillos, and Marvin Munoz engaged in concerted, activity protected by the Act. Their concerted protect activity began in June when Adelso Carrillos and the others discussed with agent Fernandez the fact the Company was not paying them enough money toward their transportation costs and enough wages and they wanted to be paid by check instead of cash. The three raised their concerns 2 days later directly with Company President Malpere. The three workers told Malpere he was paying them very little in wages and providing them too little gasoline money. In as much as the three workers voiced their wage and related issues directly to Company President Malpere and agent Fernandez the Company was fully aware the employees were engaging in concerted protected activity.

It is likewise clear Adelso, Antolin, and Munoz engaged in union activity. They spoke with Union President Simone and Vice President Crespo at the college worksite in June. They discussed wages and safety with the union representatives and told Simone and Crespo they wanted the Union's help with wages because what they were being paid was not fair.

Company President Malpere and agent Fernandez both knew the three workers met with the representatives of Union at the college worksite in June. Malpere was within approximately 20 feet of the workers when they were with the two union representatives. Malpere looked directly at the workers. Malpere knew the two representatives at the site were from the Union because of his prior relationship with the Union. Furthermore, immediately after the three workers met with the two union representatives and then left the worksite Fernandez telephoned and asked why they had talked with the representatives from the Union.

Two days after the three workers met with the Union, Adelso Carrillos was informed by Fernandez that Company President Malpere did not want him back at work; because he complained a lot and spoke too much with the Union. It is clear Adelso Carrillos' complaints',

along with the other two workers, involved wages and gasoline expense money. In addition to this direct indication of motivation for the termination, his termination came almost immediately after the employees raised pay and benefit concerns with Malpere and Fernandez and within a day or so of the workers speaking with the Union. Additionally, Company President Malpere exhibited his personal antiunion animus when he expressed to the two representatives from the Union that his prior association with the Union had cost him jobs and he no longer wanted anything to do with the Union. I find the Company was motivated in part by Adelso Carrillos' protected concert and union activity when it terminated him.

Although Antolin Carrillos and Munoz were permitted to work perhaps as much as two weeks after Adelso Carrillos was terminated the Company nevertheless terminated them. Antolin Carrillos and Munoz engaged in the same protected concerted and union activity Adelso Carrillos participated in. During the time the two workers were allowed to continue working they were treated with hostility. Antolin Carrillos and Munoz heard from fellow employees Malpere was angry with them. As a result, Antolin Carrillos telephoned Fernandez about their future with the Company and was told they had no future because Company President Malpere was "mad" at them because they spoke with the Union. I find the Company was motivated in part by Antolin Carrillos and Marvin Munoz' protected concerted and union activity when Fernandez and Malpere terminated them.

The Company's proffered justification for the terminations, that the three employees never worked for the Company, is false and pretextual and supports a finding of unlawful motivation and precludes a *Wright Line* defense. The three employees were unlawfully terminated for engaging in protected concerted and union activity and I so find.

Conclusions of Law

By on or about June 8 and later in June, 2011 terminating the employment of it's employees Adelso Carrillos, Antolin Carrillos and Marvin Munoz because they engaged in protected concerted and/or union activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Adelso Carrillos, Antolin Carrillos and Marvin Munoz, the Company must, within 14 days of the Board's Order, offer them reinstatement to their former jobs, or if their former jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any lost wages and benefits as a result of their June, 2011 discharge, with interest. Backpay is to be calculated based on the prevailing wage rate of \$63.07 at the college job site. Backpay will be computed as outlined in *F.W. Woolworth Co.* 90 NLRB 289 (1950) (backpay computed on quarterly basis). Determining the applicable rate of interest will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

(adopting Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employees shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). I also recommend the Company, within 14 days of the Board's Order, be ordered to remove from its files any reference to its June 2011, termination of Adelso Carrillos, Antolin Carrillos and Marvin Munoz, and, within 3 days thereafter, notify Adelso Carrillos, Antolin Carrillos and Marvin Munoz in writing it has done and their termination of employment will not be used against them in any manner. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

Michael J. Malpere Company, Inc., Cranford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees for engaging in concerted and/or union activity protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Adelso Carrillos, Antolin Carrillos and Marvin Munoz full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Adelso Carrillos, Antolin Carrillos and Marvin Munoz whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Adelso Carrillos, Antolin Carrillos and Marvin Munoz, and within 3 days thereafter, notify them in writing that this has been done and that their termination will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Cranford, New Jersey facility, copies of the notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since June 8, 2011.

Dated at Washington, D.C., June 27, 2012.

William Nelson Cates
Administrative Law Judge

⁶ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading, "**Posted by Order of the National Labor Relations Board**" shall read "**Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.**"

APPENDIX

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT terminate your employment or otherwise discriminate against any of you for engaging in union and/or concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Adeldo Carrillos, Antolin Carrillos, and Marvin Munoz full reinstatement to their former jobs, or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Adeldo Carrillos, Antolin Carrillos, and Marvin Munoz whole for any loss of earnings and other benefits resulting from their termination of employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Adeldo Carrillos, Antolin Carrillos and Marvin Munoz, and we WILL, within 3 days thereafter, notify them in writing that this has been done and that their termination of employment will not be used against them in any way.

MICHAEL J. MALPERE COMPANY, INC.
(Employer)

Dated: _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor, Newark NJ 07102-3110
(973) 645-2100, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.